COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts	DTE 01-31

OPPOSITION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. TO VERIZON'S MOTION FOR CONFIDENTIAL TREATMENT

AT&T Communications of New England, Inc. ("AT&T") opposes the August 27, 2001 Motion for Confidential Treatment of Verizon Massachusetts ("Verizon") to the extent that it relies on an incorrect characterization of confidentiality as the basis for refusing to provide the requested data to AT&T pursuant to a protective agreement. In its Motion, Verizon seeks what is effectively a heightened level of confidential treatment of responses to ATT-VZ 1-1 and ATT-VZ 1-2(a).[1] Verizon has provided these two responses to the Department of Telecommunications and Energy (the "Department"), but Verizon refuses to provide, even pursuant to a protective agreement, the requested data to AT&T and other parties in the proceeding.

ATT-VZ 1-1 and ATT-VZ 1-2(a) seek a list of the carriers that provide numbers to the E911 database managed by Verizon and the classes of service which those carriers provide. (A copy of AT&T's information requests and Verizon's non-proprietary responses is attached.)

[1] Verizon also moves for protective treatment of AG-VZ 3-19 and ATT-VZ 1-2(b). Verizon has provided to AT&T the responses to these two information requests pursuant to a protective agreement.

AT&T opposes Verizon's motion for confidential treatment of these two responses to the extent such treatment precludes AT&T from reviewing them: (1) on the grounds set forth in the *Motion of AT&T to Compel Discovery Responses by Verizon, or, in the Alternative, AT&T's Motion to Strike Testimony of Robert Mudge and William E. Taylor*; filed on August 27, 2001 ("*AT&T Motion To Compel Or Strike*") (2) on the ground that the requested data are not confidential and proprietary under G.L. c. 25, § 5D, such that the data may not be disclosed subject to appropriate protection; and (3) on the ground that Verizon should not be allowed to provide the requested data to the Department, and at the same time refuse to provide the requested data to AT&T and other parties, because this does not comport with due process.

Argument

I. AT&T IS ENTITLED TO INFORMATION WHICH VERIZON USES IN ITS TESTIMONY TO JUSTIFY VERIZON'S ALTERNATIVE REGULATION PLAN.

As AT&T has argued in *AT&T Motion To Compel Or Strike*, Verizon must not be allowed to exploit the advantages of its incumbency giving it superior access to information that may be relevant to this proceeding. As the incumbent carrier, Verizon is the sole custodian of the E911 database. It manages this public database for the benefit of the general public and is therefore performing a necessary public function. Verizon must not be allowed to use its position as the incumbent, and its resulting access to information, in order to advance its private interests over those of its competitors. However, Verizon is doing just that. Verizon is attempting to support its request for relaxed regulation by relying on numbers from the E911 database, while at the same time refusing to provide AT&T and other CLECs with the basis for these E911 numbers. Because the requested data are critical to AT&T's evaluation of the accuracy and significance of the numbers propounded by Verizon, the responses to ATT-VZ 1-1 and ATT-VZ 1-2(a) should be provided to AT&T, or – in the alternative – the testimony of

Robert Mudge and William E. Taylor, to the extent that these witnesses rely on the E911 numbers, should be stricken.

All parties to this proceeding should have equal access to this requested information, not just Verizon – the incumbent. The situation currently before the Department is similar to that already encountered by the Department in the context of electric and natural gas distribution companies. In D.P.U./D.T.E 97-96, where the Department established standards of conduct governing the relationship between incumbent gas and electric distribution companies and their competitive affiliates, the Department required "non-discriminatory access by competitive suppliers to products, services, *and information* offered or *held by distribution companies in their capacity as regulated monopolies*." D.P.U./D.T.E. 97-96, May 29, 1998, at 24-25 (emphasis supplied). In response to its concern with the potential abuse by incumbents of their superior access to information, the Department adopted the following rule which requires equal access to information:

> To the extent that a Distribution Company provides a Competitive Affiliate with information not readily available or generally known to any Non-affiliated Supplier, which information was obtained by the Distribution Company in the course of providing distribution service to its customers, the Distribution Company *shall make that information available on a non-discriminatory basis to all Non-affiliated Suppliers transacting business in its service territory*.

220 C.M.R. 12.03(10) (emphasis supplied). For the same reasons cited by the Department in the context of electric and gas distribution companies, the Department should not allow Verizon to take advantage of the superior access to information it has by virtue of its incumbency.

II. THE REQUESTED DATA ARE NOT CONFIDENTIAL AND PROPRIETARY UNDER G.L. C. 25, §5D, SUCH THAT THE DATA MAY NOT BE DISCLOSED SUBJECT TO APPROPRIATE PROTECTION.

In only one place in its motion does Verizon even purport to provide facts supporting its argument that the response to ATT-VZ 1-1 should be accorded confidential treatment. A review of that contention reveals that it is nothing more than a conclusory assertion. On page 4, Verizon asserts – without any basis – that the data requested in ATT-VZ 1-1 "represent valuable commercial information that competitors could find useful in establishing sales and network strategies that target particular market segments." *Motion for Confidential Treatment* ("*Verizon Motion*"), D.T.E. 01-31, August 27, 2001, at 4. Verizon does not even provide a similar conclusory statement to support its request for confidential treatment of ATT-VZ 1-2(a). Verizon provides absolutely no facts in support of its claim that the information requested by ATT-VZ 1-2(a) is confidential.

In failing to provide any explanation to support its motion for confidential treatment, Verizon certainly has not met its burden under G.L. c. 25, § 5D. The Department recently stated that "[c]laims of competitive harm resulting from public disclosure, without further explanation, have never satisfied the Department's statutory requirement of proof of harm." *See Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment*, D.T.E. 01-31 Phase I, August 29, 2001, at 7. Verizon has argued that the requested information is proprietary to CLECs with listings in the E911 database. Verizon has, however, failed to provide *any* proof that the requested information is competitively sensitive or that disclosure of this information will affect CLECs' ability to compete in the business market. Verizon has not even attempted to meet the very burden it cites for proving trade secrets. Under the standard for "trade secret" cited by Verizon in refusing to provide the requested data, Verizon must show that the requested information is "a secret scientific, technical, merchandising,

production or management information design, process, procedure, formula, invention or improvement." *Verizon Motion*, at 1, n.1 (citing G.L. c. 266, § 30(4)). It is hard to imagine how the mere fact that a CLEC has a listing in the E911 database under a category of service satisfies that statutory definition. Certainly, Verizon provides no reason why that mere fact constitutes a "trade secret" or why the disclosure of that bare fact would create competitive harm.

Furthermore, Verizon's conclusory statement that the requested identity of carriers with at least one listing in the E911 data base is confidential, *Verizon Motion,* at 4, is belied by the behavior of both Verizon and the CLECs. With regard to CLECs, they must file tariffs with the Department under G.L. c. 159, § 19, for public display that include the terms, conditions and prices of local service, in order to offer local service. It is hard to imagine, therefore, that any CLEC would expect to be held confidential the fact that it is indeed providing local service under its publicly filed tariff (as evidenced by the fact that it has at least one E911 listing). At the very least, Verizon has provided no evidentiary or logical basis in its motion for a finding that disclosure of such information (particularly when made pursuant to a protective agreement) can result in competitive harm to a CLEC.

Moreover, Verizon's own behavior is inconsistent with its claim that the identity of a CLEC with a listing in the E911 database can be disclosed only with the permission of such CLEC. Verizon has in fact identified two carriers who list their numbers in the E911 database in the proprietary attachment to ATT-VZ 1-2(b) which Verizon provided to AT&T pursuant to a protective agreement. Obviously, Verizon is not serious about refusing to disclose information without carrier authorization when Verizon itself has used the information and Verizon already has revealed the names of carriers who list numbers in the E911 database to other carriers.

III. VERIZON SHOULD NOT BE ALLOWED TO PROVIDE THE REQUESTED DATA TO THE DEPARTMENT AND AT THE SAME TIME REFUSE TO PROVIDE THE REQUESTED DATA TO AT&T AND OTHER PARTIES, BECAUSE THIS DOES NOT COMPORT WITH DUE PROCESS.

Verizon's refusal to provide parties in this proceeding with the responses to ATT-VZ 1-1 and ATT-VZ 1-2(a), while at the same time providing them to the Department, raises due process concerns. As ex parte communications violate procedural due process and threaten the integrity of the administrative adjudicatory process, so does Verizon's pretext of using an AT&T discovery request to communicate substantive information to the Department while denying an opportunity for AT&T to respond. Disclosure of the requested data to the Department only, without the opportunity for review by AT&T and other parties, does not comport with due process.

Conclusion

For the reasons stated above, and for the reasons stated in the *AT&T Motion To Compel Or Strike*, Verizon's motion for confidential treatment should be denied.

Respectfully submitted,

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

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